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Thomas J. Dempsey

EVIDENCE OF PRICES IN PENNSYLVANIA EMINENT DOMAIN PROCEEDINGS

By THOMAS J. DEMPSEY*

INTRODUCTION

IN eminent domain proceedings, the courts of most jurisdictions regard evidence of the recent selling prices of properties similar to, and in the same neighborhood as, the property affected as being of material assistance to the trier of facts in determining the fair market value of the property taken or injured.[1] The minority rule which prohibits such evidence as going toward value has been termed the "Pennsylvania rule." [2] The classification of Pennsylvania as titular head of the minority is reason enough to examine its rule and the cases which have developed it.[3] But, in addition, there have been protestations, private and public, from both the legal and appraising professions calling for a reexamination and revision of the Pennsylvania doctrine.[4] A typical expression of discontent on the part of the professions was voiced as follows:

> "One conclusion of those present was that rules of evidence exist in many states which so limit an appraiser on the witness stand that he cannot in fact demonstrate his competence, or lack of it. Where the witness is limited to an expression of opinion and not allowed to explain the basis on which it rests, a a highly qualified and skilled expert appears to the judge and the jury little different from a complete nonentity." [5]

Unfortunately, Pennsylvania may well be one of the states to which reference is made. For these reasons, it seems important, especially in these times when many have the power of condemnation and all who have it use

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* A.B., University of Pittsburgh, 1949; L.L.B., University of Pittsburgh Law School, 1951; Assistant County Solicitor, Allegheny County; former Assistant Attorney General, Commonwealth of Pennsylvania; member of the bar of the Supreme Court of Pennsylvania and the Courts of Allegheny County; member of the American, Pennsylvania and Allegheny County Bar Associations.

[1] 20 AM. JUR., *Evidence* § 376 (1939); 5 NICHOLS, EMINENT DOMAIN § 21.3 (3d ed. 1952); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 137 (2d ed. 1953) (hereafter cited as ORGEL).

[2] 20 AM. JUR., *Evidence* § 376 (1939); Annot., 118 A.L.R. 869 (1939).

[3] Legal periodicals issuing from Pennsylvania sources have largely ignored this problem. As bearing in some degree on the question see: Haig, *The Law of Eminent Domain in Pennsylvania,* 30 AM. L. REG. (m.s.) 449 (1891); Note, 103 U. PA. L. REV. 827 (1955); Graubart, *Theory Versus Practice In The Trial Of Condemnation Cases,* 26 PENN. B. A. Q., No. 1, page 36 (Oct. 1954); Lewis, *Eminent Domain in Pennsylvania,* PA. STAT. ANN. tit. 26 p. 1.

[4] See, e.g., Graubart, *op. cit. supra* note 3.

[5] Preface, *The Appraiser's Job in Eminent Domain Proceedings,* Bureau of Business Research, University of Pittsburgh School of Business Administration (1957).

it, to review the Pennsylvania rules with regard to the admissibility in eminent domain proceedings of sales price evidence.

The simplest and most direct, if somewhat burdensome, way to do this is to consider the cases in the same order as they were decided, dividing them, however, into two logically distinguishable groups: those cases involving the selling prices of similar properties and those cases involving the selling price of the very property in question. History and experience, refusing to be logically compartmentalized, require the addition of a third related group: tax assessment and miscellaneous cases.

Because the Pennsylvania appellate courts first had before them questions involving the selling prices of similar properties, that group may aptly be discussed first.

I. Similar Property Sales

Hays v. Risher[6] involved a proceeding under the lateral railroad act. Risher, as the statute allowed, laid out a route from his mine over the intervening land of Hays to the bank of the Monongahela River. At the trial to fix the damages occasioned to Hays' land by this action, Hays proposed to prove by one of his own witnesses the price usually paid for such rights of way under like circumstances. This offer was made for the purpose of showing the actual market value of the right claimed by Risher. The trial court's order sustaining Risher's objection to this offer was affirmed on appeal, the Pennsylvania Supreme Court saying, "And the question of damages was a positive and not a comparative one. The plaintiff was entitled to receive what would repair his estate, not what was usually paid for similar privileges."

Here was the germ of the Pennsylvania rule as it was to develop. But note that this actually falls into that class of cases known as "transactions with the condemnor" cases since, by virtue of the act, Risher was exercising a delegated power of eminent domain, and it can safely be assumed that the prices which Hays wished to introduce were paid by other such "condemnors." Further, Hays did not offer to show the fair market value of his own property before or after the appropriation, but only the price paid to acquire an easement.

The location of a railroad gave rise to *Searle v. The Lackawanna and Bloomsburg Railroad Company.*[7] Though the case did not involve a sale

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[6] 32 Pa. 169 (1858).

[7] 33 Pa. 57 (1859).

price question, the Court through Chief Justice Lowrie paid its respects to French law with a dictum at page 64:

> "On the subject of taking land for public uses, the French have a very carefully prepared system in their law of 8 March 1810, *sur les expropriations pour cause d'utilitè publique;* and it directs the market value to be ascertained by reference to recent actual sales in the neighborhood, by the tax-lists and other documents, with the aid, if necessary, of experts, or persons whose business it is to deal in such values: Art. 16, 17."

Two years later, the laws of France having been either forgotten or rejected, the Court established in the leading case of *East Pennsylvania Railroad v. Hiester*[8] the doctrine that evidence of similar sales prices is not admissible on direct examination. Counsel for Hiester had been allowed, over objection by the defendant, to show through two of plaintiff's witnesses the prices at which several properties had sold in the local area prior to the appropriation of part of plaintiff's land for railroad purposes. The witnesses described the location and condition of the properties sold and compared them to Hiester's land. One of the witnesses was the former owner of a tract sold and the other, in at least one instance, had his knowledge of the sale price directly from the purchaser. One of the sales mentioned was made in a settlement with another railroad. In reversing the judgment for the plaintiff the Court gave two reasons, the first of which was expressed by Thompson, J. in the following language:

> "We cannot hesitate to say that this evidence was improper, and should not have been received. The hearsay portion of it was not objected, specifically, and had there not been a graver error in the admission of the answer in other particulars, it would scarcely have been worth noticing; as it stood, it was erroneous under the objection made. The subject of inquiry before the jury was, to find the value of the plaintiff's land per acre, and especially that portion of it taken by the defendants. This was to be ascertained by the application of certain tests: its value as estimated by witnesses, in view of its location, productiveness, or other uses, not speculative, or by the market value, or, more properly, the selling price of land in the neighborhood. This last test was approved in Searle v. Lackawanna and Bloomsburg Railroad Company, 9 Casey 57; and it is there said that sometimes the value cannot be ascertained in any other way. There can certainly be no objection to this test, but the evidence received went far beyond it. It did not pretend to fix the market value of the land, but assumed to ascertain it by the special, and, it may be, exceptional cases named. This will not do, for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated on the other; and thus there would be as many branching issues as instances, which, if numerous, would prolong the contest interminably."

[8] 40 Pa. 53 (1861).

In short, this reason is that collateral issues would be introduced by such evidence which might unduly prolong the trial. The Court's second reason was then stated as follows:

> "But even this is not the most serious objection. Such testimony does not disclose the public and general estimate which, in such cases, we have seen is a test of value. It would be as liable to be the result of fancy, caprice, or folly, as of sound judgment, in regard to the intrinsic worth of the subject matter of it; and, consequently, would prove nothing on the point to be investigated. The fact as to what one may have sold or received for his property, is certainly a collateral fact to an issue, involving what another should receive, and, if no way connected with it, proves nothing. It is, therefore, irrelevant, improper, and dangerous. Not so with a market value. That is a recognized fair test. It holds good, let the demand and supply be as they may, and is equally reliable, whatever may be the relative value of money and property, or the circumstances of the country. It is supposed to represent the judgment of the community, and approximately fixes the value of a given article or thing, as it may do the character of a person."

Essentially, what the Court has said here is that proof of the selling price of particular sales is not relevant to prove general market value which is held to be the true test of value.

These two grounds must be considered in further detail. First, however, it should be pointed out that later in its opinion in this case the Court remarked, "The question might be proper by way of cross-examination to test the accuracy of the witness, but not otherwise." This statement is the foundation for the Pennsylvania rule that an expert witness may, under certain circumstances, be required to state the prices at which similar properties sold, not for the purpose of proving or tending to prove value, but for the purpose of impeaching his credibility.

Returning to the first reason given for the decision in the *Hiester* case, it is appropriate to note at length a discussion in Wigmore on Evidence which utilizes an extensive quotation from the *Hiester* case.

An appreciation of Wigmore's principles of Relevancy and of Auxiliary Probative Policy is a pre-requisite to understanding the passage. Discussing the question of the admissibility of evidence of a thing's capacity or tendency to produce an effect found attending the same thing elsewhere Wigmore points out [9] that the admissibility of a given piece of such evidence will be determined by the principles of Relevancy, and of Auxiliary Probative Policy. The former requires that the circumstances under which the other conduct occurs should be substantially similar. The latter principle allows the exclu-

[9] 2 WIGMORE, EVIDENCE § 459 (3d ed. 1940) (hereinafter cited as WIGMORE).

sion of relevant evidence, wherever it would, in the case in hand, involve an unfair surprise,[10] an undue prejudice, or a disproportionate confusion of issues and a waste of time. Elsewhere,[11] the text writer indicates in answer to the Confusion of Issues Argument that the confusion is usually no greater than that which occurs in the trial of other matters, and that, in those instances where the disadvantage of confusion on a minor issue becomes real and marked, without compensating advantage from useful evidence, it is unnecessary to take the radical step of excluding all such evidence by universal rule when by the simple expedient of leaving it to the trial court to draw a line of exclusion wherever the evil of confusion of issues impends, a more sensible solution may be reached. Wigmore explains:

> "The whole objection in question is mainly (as Mr. Justice Holmes has neatly put it [citing Reeve v. Dennett, 145 Mass. 28, 11 N. E. 938]) 'a purely practical one, a concession to the shortness of life'; and it would be unworthy of the genius of our law if Courts should feel obliged to lay down a hard and fast rule of exclusion when such a simple expedient was at hand for preventing the supposed disadvantages."

Immediately following,[12] Wigmore suggests that the true solution of the conflicting considerations is that evidence of this sort, when relevant, should be admitted unless in the discretion of the trial court it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues.

Wigmore takes up the present problem in section 463, p. 504, where he says:

> ". . . [T]his question is usually presented in the form, whether a sale of other property is admissible as evidence of the value of the property in question.
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> "In answering this question, it is found that the two leading principles already expounded come into joint application,—the principle of Relevancy and the principle of Auxiliary Policy. . . . According to the former, the value or sale-price of the other property is relevant only when the property is *substantially similar in conditions;* according to the second, it may be excluded, though relevant, if it involves in the case in hand a disproportionate *confusion of issues* and loss of time.
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> "The latter consideration has weighed so much with a few Courts that they have treated it as requiring the absolute and invariable exclusion of such evidence.

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[10] New York, formerly a minority state, joined the majority through legislation. See, e.g., N.Y. VILLAGE LAW § 318a. These acts provide a notice procedure whereby the adversary must be made aware of the sales intended to be relied on, thus eliminating the surprise element. For a discussion of these acts and the problem generally see Legislation Note, *Evidence of Sales In Condemnation Proceedings,* 32 COLUM. L. REV. 1053 (1932).

[11] 2 WIGMORE 443.

[12] 2 WIGMORE 444.

"It is enough to note (1) in answer to the argument from Relevancy, that since value is a money—estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential and is so treated in commercial life, all the argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy; (2) in answer to the argument for Auxiliary Probative Policy, it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial Court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to receive it. . .

"Except in a few jurisdictions, this class of evidence is received.

". . . In some jurisdictions its use is limited to the testing of value-witnesses on *cross-examinaiton*. Even in the jurisdictions where it is rejected, its force is so far recognized that numerous absurd quibbles become necessary in order to distinguish between that which is rejected and that of which common sense compels a hearing."

In commenting on the *Hiester* case, Orgel observes that the Court, in ruling out the evidence of sales prices did not rely solely on the "collateral issues" argument but "went further and even questioned the relevancy of evidence of sales." [13] This point was keenly grasped in *United States v. Certain Parcels of Land in City of Philadelphia.*[14] In that case, heard by two Circuit Judges and a District Judge, the only question before the court was whether, in a case to determine the value of property taken by the United States under the power of eminent domain, a written contract for the sale of the identical property, executed shortly before the taking, is admissible in evidence as bearing on the market value of the property. The trial court had refused to receive the contract when offered in evidence by the owner of the property. In reversing the lower court, it was held that federal law controlled on the question of admissibility and that under federal law the contract was proper evidence.

The case had been tried in the court below on the theory that Pennsylvania law applied on evidentiary questions and District Judge Bard, who wrote the opinion for the Circuit Court availed himself of the opportunity to review the Pennsylvania rules and particularly the import of the *Hiester* case and Pennsylvania's market value definition as expressed in that and subsequent cases. His conclusion was that Pennsylvania law would not admit the evidence. This was based on the following reasoning:

"It has long been settled in Pennsylvania that evidence of the sale price of lands similar to the parcel condemned is inadmissible. . . . The

[13] 1 ORGEL 143.
[14] 144 F.2d 626 (3rd Cir. 1944).

principle reason upon which this rule is based is significant because it is broad enough to be equally applicable to evidence of sales of the very property condemned. This reason is that 'market value' in this type of case in Pennsylvania depends on 'judgment of the community' rather than that of a particular buyer and seller."

Later, Judge Bard compared the federal and Pennsylvania standards as he saw the latter revealed by the early cases:

"Under the concept of market value [i. e., what it fairly may be believed that a purchaser in fair market conditions would have given], set forth by the Supreme Court [of the United States] as the 'practical standard' by which the constitutional requirement of just compensation to the owner of the land taken by the United States for public use is determined, it would certainly appear that evidence of the sales price of the land in question is relevant and admissible. . . . And if market value, as construed in condemnation proceedings by the United States is 'what a willing buyer would pay in cash to a willing seller,' evidence of what the property sold for in a bona fide sale is most significant. Indeed, substantially the same definition of market value has been adopted by the Pennsylvania Courts in tax assessment cases, in which, as pointed out above, evidence of the sales price is recognized to be admissible and to have a substantial bearing on market value. It will thus be seen that it is a difference in the definition of the term 'market value' in condemnation proceedings, and not merely a difference in the procedure by which the elements of a commonly defined standard are proved, which renders evidence of the sale price relevant and admissible in condemnation proceedings in the federal courts and irrelevant and inadmissible in condemnation proceedings in the Pennsylvania court."

The holding of *East Pennsylvania Railroad v. Hiester* still rules in eminent domain similar property sales cases today.[15]

The next case to come before the Court was *Pittsburgh, Virginia and Charleston Railroad Co. v. Rose*[16] where counsel for the defendant had requested the lower court to charge ". . . that the best evidence of market value is the price actually paid for land in that neighborhood, making due allowance for difference in position and improvements." In affirming the lower court's refusal to so charge, Sharswood, J. said for the court:

"The selling price of land in the neighborhood is undoubtedly a test of the value. But that is very different from the price paid for any particular property or properties. The true test is the opinion of witnesses in view of location, productiveness and the general selling price in the vicinity. Market value depends upon the judgment of the community, and a consideration of particular sales would lead to collateral issues as numerous as the sales."

[15] Pennsylvania & N.Y.R.R. and Canal v. Bunnell, 81 Pa. 414 (1876); Gorgas v. Philadelphia, Hbg. & Pgh. R.R., 215 Pa. 501, 64 A. 680 (1906); Brown v. Scranton, 231 Pa. 593, 80 A. 1113 (1911).

[16] 74 Pa. 362, 369 (1873).

In *Hays v. Briggs*[17] the trial court had permitted the defendant in the issue framed to prove prices and the rate of increase in value of the similar properties from the time of the sales to the time of this appropriation. At least one of the "similar transactions," the "price" of which was introduced, was a viewers' award. Defendant's evidence was submitted to show the value of the proposed landing at the time Briggs sought to acquire it. In reversing the judgment the Court expressed the view that, in addition to being repugnant to the Hiester and Rose decisions, the transactions were too remote in time and, of course, one was actually a viewers' award.

One must admire counsel for the defendant in *Pittsburgh & Western Railroad Company v. Patterson.*[18] He massed a frontal assault on the doctrine of the *Hiester* case by proposing to show by a witness in his case in chief:

> ". . . [T]hat about and since the date of the location of the railroad, sales of river fronts in the vicinity of the Patterson property have been made, each having landing and mainland facilities equal to those of the Patterson landing, and the prices at which said sales were made. This in connection with other testimony in the case for the purpose of showing the value of the Patterson landing, and like landings in the vicinity."

Rebuffed by the court below, this daring warrior approached the Supreme Court. His argument had been summarized by the reporter of the case:

> "Sales of property, whether real or personal, fix the market value of similar property for the time being; all business men regard such sales as a test and criterion, and it seems against reason to exclude evidence of such sales in a legal proceeding, the very object of which is to ascertain market value as a measure of damages. Many authorities recognize the propriety of such evidence, subject only to proper qualifications of similarity in character and situation of the properties, and as to time of sale, etc. Our offer was fully up to the required standard in these particulars."

The Court was unimpressed by the authorities from other jurisdictions and texts that were cited by defendant and held that the law of Pennsylvania was well settled (as indeed it was) contrary to defendant's position. In defeat, counsel for the defendant might well have mused that he was beaten, not by the sword of any tangible foe, but by a spectral, elusive image—possibly a myth—the general selling price, the judgment of the community.

The limitations on sales price testimony on direct examination which still persist today are exemplified by the reporter's notes of the lower court's ruling on defendant's offer:

> "We understand the Supreme Court to have ruled that particular sales and the prices at which they have been made cannot be given in evidence,

[17] 74 Pa. 373 (1873).
[18] 107 Pa. 461, 462 (1884).

> and for that reason we sustain the objection. We will, however, allow the witness to testify that he has knowledge of particular sales in the neighborhood, and that he knows the prices, in order to show his knowledge of values, but not to give the prices at which the sales were made. He can simply testify to the fact that he knows of the sales and knows the prices."

The mystic quality of the term "general selling price" is further revealed by dicta in *Pittsburgh, Virginia and Charleston Railway Co. v. Vance*[19] as follows:

> "The general selling price of lands in the neighborhood cannot be shown by evidence of particular sales of alleged similar properties; it is a price fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, *bona fide,* in the neighborhood."

In the *Ziemer* case[20] the Court affirmed rejection of an offer by the defendant railroad to prove what had been paid by it to other property owners along the same street for the privilege of laying their tracks upon it. The rationale of the decision was that the other purchases had been made by way of settlement or compromise. But the Court went further and said:

> "Aside from this, to render such testimony of any value the conditions must be shown to have been similar. This would involve as many issues before the jury as there were persons who had been settled with." [21]

The first eminent domain case in which the Pennsylvania Supreme Court had before it an instance of testimony of prices on cross-examination was *Schuylkill River, etc. R. Co. v. Stocker.*[22] There the plaintiff in cross-examining one of the defendant's witnesses asked a series of questions which elicted from an unskilled, innocent or honest witness information that a particular property, as to which the witness had made inquiry, was being held for sale at $5,000 an acre. This value per acre was identical with the testimony of one of the plaintiff's witnesses as to the value of plaintiff's land and was far higher than other of defendant's witnesses calculated the worth of the subject property.

In charging the jury the trial court made reference to the testimony of this witness:

> "If he has correctly represented the value of that property, then you may think that the value of this property would be larger than that put upon it by some of the defendant's witnesses."

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[19] 115 Pa. 325, 8 Atl. 746 (1886).

[20] Pennsylvania Schuykill Valley R.R. v. Ziemer, 124 Pa. 560, 7 Atl. 187 (1889).

[21] *Accord,* Pennsylvania Schuylkill R.R. v. Cleary, 125 Pa. 442, 17 Atl. 468 (1889), reversing a ruling permitting asking prices of lots in neighborhood to be shown where the tract in question was undivided meadowland.

[22] 128 Pa. 233, 18 Atl. 399 (1889).

The defendant charged on appeal that this instruction was error; that it was a direction to the jury that the value of the similar property, as testified to by the witness, should affect the estimate by the jury of the value of the Stocker farm.

The Court dismissed this assignment of error (but reversed on other grounds) saying of the phraseology complained of:

> "It was a mere passing observation as to what the jury might think, not a suggestion that they should think in any particular way on the subject referred to."

The cross-examining of valuation witnesses as to prices at which similar lands sold was done in *Curtin v. Nittany V. R. Co.*[23] by defendant of plaintiff's witnesses. °The interrogatories developed that an adjoining tract had been sold at a public sale within two years for $50 an acre and that a small piece of another farm had sold at $200 per acre. The court charged the jury in part:

> "Wherever it [market value] can be ascertained by public sales of lands adjoining, the market value may be ascertained in that manner; where there have been no public sales, the market value must be ascertained from the knowledge and judgment of men who are acquainted with the property, and who by their experience and judgment can give the jury a fair, honest, and impartial opinion as to the real value of the property."

Counsel for the defendant appealed the judgment for plaintiff arguing that this portion of the charge allowed the jury to consider as being of the highest importance evidence of particular sales which evidence, he stated, is utterly inadmissible. Held: the trial court did not violate the established Pennsylvania rule, that the defendant itself is solely responsible for the evidence complained of, and that the general tenor of the charge indicates that the reference was to the general selling price in the neighborhood, and not to any particular sales.

The charge of the court as related to selling prices was again before the Supreme Court in *Becker v. The Philadelphia & Reading Terminal Railroad Company.*[24] Green, J. restated the Pennsylvania rule that market value as a measure of damages cannot be ascertained by evidence of particular sales of other property alleged to be situated similarly to the one in question. Such evidence, the Court said, would introduce collateral issues. Then the Court added, "Of course such evidence may be brought out by the cross-examination of witnesses."

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[23] 135 Pa. 20, 19 Atl. 740 (1890).

[24] 177 Pa. 252, 35 Atl. 617 (1896).

As testimony of the general selling price of similar properties in the vicinity, but not of particular sales, is permissible to prove market value, so testimony that the property taken was of a kind which owners in the vicinity were glad to get rid of and permitted to be taken away without cost is proper to prove the non-existence of market value. Such was the decision in *The Morris and Essex Mutual Coal Company v. Delaware, Lackawanna and Western Railroad Company.*[25] The defendant had removed culm from plaintiff's land and on the basis of the type of testimony indicated recovered a verdict and judgment in its favor. The following excerpt shows the reasoning of the Court in affirming on plaintiff's appeal:

> "That culm . . . was given away by the owners with a desire to get rid of it, was illustrative and confirmatory of the assertion that it had no market value. A single instance, it is true, would not be enough, as a particular sale of land is not evidence of the market value of other land in the same vicinity, as it may have been compelled by necessity or have been the result of caprice or folly: P. & W. R.R. Co. vs. Patterson 107 Pa. 461."

Henkel v. Wabash Pittsburgh Terminal Railroad Company[26] is a significant case with respect to rebutting the effect of sales price testimony where it has been introduced by an adversary. The plaintiff in that case had called to the attention of witnesses on both sides the sales of two particular properties in the immediate vicinity of the property in question. With his own witnesses he had done this on their examination in chief. On the cross-examination of the defendant's witness, he had shown the prices paid for the two properties. Defendant's cross-examination of plaintiff's witnesses developed that one of them had based his opinion of the value of plaintiff's property entirely on one of these sales, and that another witness has based his opinion mainly if not exclusively on the two sales.

During its case defendant offered and was allowed to prove by the purchasers that the sales were made under special circumstances and that the prices were greatly in excess of the market values of the properties and were not a criterion thereof.

The plaintiff appealed from a judgment in his favor charging as error the admission of this testimony presented by defendant. The Supreme Court affirmed the ruling of the trial court. After noting the reliance placed on the two similar sales, Fell, J. observed, "The prices paid for these properties thus became a standard of value of property in the vicinity."

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[25] 190 Pa. 448, 42 Atl. 883 (1899).

[26] 213 Pa. 485, 62 Atl. 1085 (1906).

The reasoning of the decision was explained by Mr. Justice Fell as follows:

> "While particular sales may not be proved as establishing a market value, the good faith of a witness and the accuracy and extent of his knowledge may be tested by questioning him as to particular sales, to ascertain whether he knew of and considered them in forming an opinion. These inquiries go directly to the value of the opinion expressed. We see no reason why a party against whose interest a witness has testified may not show that the opinion expressed is valueless as evidence because it is founded on a misapprehension of the facts, as that a supposed sale has never been made, or that the consideration named was fictitious, or that the sale had been without regard to the market value. This does not lead, as would the proof of particular sales, to the trial of collateral issues. It goes only to impair the value of an opinion which has become evidence in the case by showing that it is based on a misapprehension of the real facts."

Issue could easily be taken with the proposition that the allowance of such testimony does not lead to the trial of collateral issues. It is, after all, the same testimony as would be presented if proof of prices were permitted as bearing on value, but only for a different purpose. But at least the rule is becoming more workable and even the Court admitted that the two similar sales here involved established "a standard of value." This case presented that class of evidence "of which," in Wigmore's phrase, "common sense compels a hearing."

The railroad's attorney in *Schonhardt v. Pennsylvania Railroad Company*[27] was not allowed by the lower court to ask the plaintiff on cross-examination the prices at which four similar properties, two on each side of plaintiff's, were recently sold. Since the offer had been stated by defendant's counsel to be for the purpose of testing plaintiff's knowledge as to the values and for the purpose of having the testimony go to the jury on the question of value, the Supreme Court affirmed the ruling.

The doctrine of the *Henkel* case was severely narrowed by the decision in the case of *Neely v. Western Allegheny Railroad Co.*[28] Counsel for the defendant was allowed on cross-examination to ask the selling prices of similar properties of which plaintiff's witnesses had knowledge. But when he attempted to have the witnesses compare the similar properties with the one in question, as to location and physical characteristics, plaintiff's objections were sustained. The Supreme Court affirmed the ruling of the trial judge, stating through Fell, J.:

> "A witness may be asked as to particular sales to ascertain whether he knew of and considered them in forming an opinion as to value, and it

[27] 216 Pa. 224, 65 Atl. 543 (1907).
[28] 219 Pa. 349, 68 Atl. 829 (1908).

> may be shown for the purpose of affecting the weight of the opinion he has given, that it is based on a misapprehension of the facts: Henkel v. Railroad Co., 213 Pa. 485. But to show value by comparison with other lands or to attempt to weaken the testimony of a witness by showing that his opinion was not based on a proper comparison of properties is open to the same objection that excludes testimony as to particular sales."

The *Henkel* case facts and the *Neely* case facts are not truly distinguishable. Only different. In the former, the misapprehension sought to be shown was as to the validity of the price paid as a fair representation of market value. In the latter, the misapprehension intended to be demonstrated was as to the degree of comparability of the properties. The collateral issues problem decided the case.

Of the *Neely* decision, Wigmore says,

> "[C]ross-examination allowed to particular sales, but not to particular values; the rule of the State, being unsound to start with, now leads to tweedle-dum and tweedle-dee distinctions." [29]

In *Rea v. Pittsburgh & Connellsville Railroad Company*[30] the court was as liberal in permitting impeaching evidence as it had been conservative in the *Neely* case. Here, both plaintiff's and defendant's witnesses, in valuing plaintiff's property, placed great weight on a neighboring property, known as the Klondike Warehouse, and regarded it as a standard of value in the neighborhood. The sale of this property had occurred in the same year as the condemnation. Witnesses for each side testified to the value of the warehouse building and the lot on which it stood separately. By assigning a low value to the building, the plaintiff's witnesses showed a higher square foot value on the land. Defendant's offer to prove by a building contractor the value of the warehouse building was rejected by the lower court.

The Supreme Court held that the evidence should have been allowed and reversed the judgment of the court below. Moschzisker, J. said for the Court, after quoting from the Henkel decision:

> "The defendant's offer to prove the fair value of the buildings at the time of the sale was rejected, and counsel contends that had this testimony been admitted it would have shown the improvements to have been worth at least double the value placed on them by certain of the plaintiff's witnesses; which well might have materially affected the value of the opinion expressed by these witnesses. On this state of facts we are of opinion that the testimony should have been received."

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[29] 2 WIGMORE 463, note 2 at 511.

[30] 229 Pa. 106, 78 Atl. 73 (1910).

In *Burns v. Pennsylvania Railroad Company*[31] the plaintiff had offered in evidence "for the purpose of showing the consideration and what was conveyed" a deed from the Aspinwall Land Company to the defendant conveying several lots of ground adjacent to the lots of plaintiff taken by the defendant, as well as a strip of river frontage. There apparently was no objection made to the receipt of this evidence. The defendant did, however, offer to prove how the consideration was made up and what was paid for each of the lots described in the deed and for the river frontage. The objection of the plaintiff to this evidence was sustained. On appeal by the defendant the Court reversed the judgment. This was of course the equitable decision. What is particularly worthy of note is the attitude of the Court, speaking through Mr. Justice Mestrezat, as to the evidence of the selling prices going towards value. The following from the opinion scarcely reflects disapproval:

> "This offer [of the plaintiff] was, of course, for the purpose of showing the price of the lots conveyed as evidence of the value of the lots taken. . . . [The offer of the defendant] was not an attempt to correct or explain the deed, but simply to explain the consideration, and to inform the jury what was paid for each of the several lots embraced in the deed. This testimony was necessary if the price of the lots conveyed by the Aspinwall company was to be of service to the jury in ascertaining the value of the lots condemned by the defendant company."

The *Burns* case also held that an offer made by one not clearly shown to be an agent of the defendant was admissible but that an offer and an unexecuted settlement agreement made after the filing of the bond were not admissible.

In *Drexler v. Borough of Braddock*[32] it was held improper to ask a valuation witness on cross-examination, for the purpose of impeaching his testimony, whether he had not testified in an entirely unrelated condemnation case that the property there involved was worth $800 a front foot.[33]

Because of its unclear opinion *Roberts v. Philadelphia*[34] cannot be read except in connection with *Girard Trust Co. v. Philadelphia*[35] which was decided two years later. The *Roberts* case seems to hold that no cross-examination is permitted of a value witness with regard to the prices at which similar properties in the same neighborhood have recently sold. Of course this doctrine flies in the face of all prior cases and it was therefore necessary in the

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[31] 229 Pa. 648, 79 Atl. 125 (1911).
[32] 238 Pa. 376, 86 Atl. 272 (1913).
[33] The Court properly considered that the witness's testimony was utterly irrelevant. The offer of it might even be said to have been preposterous.
[34] 239 Pa. 339, 86 Atl. 926 (1913).
[35] 248 Pa. 179, 93 Atl. 937 (1915).

Girard Trust Co. case for the court to point out that the prices inquired about in the *Roberts* case were associated with sales not testified to by the witnesses. Together these two decisions establish the rule that prices may be asked of a valuation witness on cross-examination for the purpose of testing his credibility only as to those sales which he testifies he had knowledge of and considered in forming his opinion of market value.[36]

The following language of Moschzisker, J. in the *Girard* case points up the meaning of the *Roberts* decision and recommends a course of conduct which we shall see was subsequently reaffirmed by the Court:

> ". . . but, generally speaking, even on cross-examination, such a witness cannot in the first instance be interrogated concerning the prices brought at sales not relied upon by him in making his original estimate of value, although, if he has relied on some sales in the neighborhood, he may be asked, without mention of prices, if he knew of other sales of properties similarly located and whether he considered them, and if not, why not; the course which the investigation may take after that depends largely upon the discretion of the trial judge, constantly keeping in mind the fact that the cross-examination is merely to test the good faith and accuracy of knowledge of the witness, and that prices paid at particular sales of other properties are not, in themselves evidence of the market value of the land in controversy . . ."

Mr. Justice Moschzisker gave further recognition to the discretionary powers of the trial judge in this type of case when he held on behalf of the Court in *Machesney v. Pittsburgh & Connellsville Railroad Company*[37] that the lower court had not committed error in refusing to allow the blanket question, "And all of those sales were at a much less figure than the one you mentioned, weren't they?" The Justice pointed out that the trial judge had permitted liberal cross-examination of several witnesses within the proper limits ". . . recently suggested by us in *Girard Trust Co. v. Philadelphia* . . ." It was felt that the blanket question, under the circumstances, might have" . . . tended to confuse, rather than clarify, the case."

In 1917 another advance step was taken in *Stone v. The Delaware, Lackawanna and Western Railroad Company.*[38] At the trial defendant had been permitted without objection to cross-examine plaintiff's valuation witnesses concerning sales of similar properties and the prices obtained therefor. The court then allowed the plaintiff, on redirect examination of his witnesses, to ask them to state the selling prices of still other similar properties in the

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[36] *Accord,* Serals v. West Chester Borough School District, 292 Pa. 134, 140 Atl. 632 (1928).
[37] 252 Pa. 225, 97 Atl. 397 (1916).
[38] 257 Pa. 456, 101 Atl. 813 (1917).

neighborhood. The defendant appealed and assigned this ruling as error. Held: the lower court did not commit error. The reasoning of the decision is that unless such testimony is allowed the jury will not possess all the facts upon which the witness founds his estimate of value and will not, therefore, be in a position to properly evaluate his opinion. Speaking again of the trial court's discretionary powers and stating the rationale of the decision, Frazer, J. says,

> "Under such circumstances when defendant questions the witness regarding other sales the door for the admission of such testimony [sales prices on redirect examination] is open. To what extent the investigation along this line should be carried is a matter within the sound discretion of the trial judge, as was stated in Girard Trust Co. v. Philadelphia, supra.
>
> "A familiar rule of evidence is that where a witness testifies to part of a transaction, the opposing party may insist upon the complete transaction being shown, even though such evidence be otherwise inadmissible . . . and we see no reason why that rule should not be applied in cases of this class."

We have seen the Court using, especially in the *Girard Trust Co.* case, the word "base" in stating the circumstances under which a witness may be cross-examined regarding comparable property sales prices. Another term used is "relied on." The genius of the lawyer and of the appraiser-witness is such that certain of them began to indulge in semantics to avoid having to declare before the jury for any purpose the prices at which properties, admittedly similar to the plaintiff's, had been sold. This practice continues in spite of *Pennsylvania Co. for Insurance on Lives, etc., v. Philadelphia.*[39] There the lower court had protected such a witness from disclosure.[40] In reversing, Mr. Justice Kephart declared for the Court:

> "The court below held that to entitle an adverse party to cross-examine, the witness must have 'based' or formed his judgment from a particular sale; the real estate experts fenced with the word 'based,' deeming its use necessary to open the door to such cross-examination as to prices paid for land similarly situated, as indicated in Girard Trust Company, Trustee, v. Phila., supra. Other words were used which conveyed the idea that in fixing the value of the land in suit they depended, to some extent, on the prices paid for other properties. Illustrative of this, witnesses state: 'I have taken them [sales in the vicinity] [41] into consideration but I would not say that I had based it [the value] absolutely on those sales. I have considered all of them.' 'I considered them, I didn't rely on them absolutely.' 'That [an adjoining property sale] assisted me. It was not the controlling factor by which I determined my price.' 'I took into account all the sales of land in

[39] 268 Pa. 559, 112 Atl. 76 (1920).

[40] This is an area where the empiric method suggested by Lewis (*op. cit. supra* note 3, at 47) might be utilized by appealing more cases where the witness is protected.

[41] The language in brackets throughout this passage is that of Kephart, J.

> the vicinity . . .' . . . all of these statements, and others, show that the sale prices of the neighborhood property were part of the basis upon which the estimate of value of appellee's land was found.
>
> "The court and the witnesses were mistaken as to the effect of our decision in Girard Trust Co. v. Phila., supra. We did not intend to limit the cross-examination to the use of a particular word; but we did intend to place the effect of the evidence before the trial court in such position that, if a fair investigation demanded the source of a witness's knowledge, the court might permit the investigation; and when it appeared a witness considered—in the sense that, in his estimate of value, he was aided by, or relied on—prices paid for properties similarly situated, he may be cross-examined as to the prices paid for such other similar properties, as testing his good faith, credibility, accuracy and extent of knowledge. . . . [T]he test must be the use made by the witness of the sale price of the property thus situated. If it did not enter into his estimate as a factor upon which value was based, he cannot be cross-examined as to the sale price."

As to any given similar property sale there would seem to be four possibilities: (1) the witness might be ignorant of the sale; (2) the witness might know of the sale and have rejected it in toto in forming his opinion; (3) he might have relied on the sale conclusively; or (4) he may have taken it into account in some lesser degree than conclusively. The *Pennsylvania Co., etc.,* decision allows cross-examination as to the selling price in instances (3) and (4) but not as to instances (1) and (2). The language of the *Girard* case that if a witness has stated he relied on [in the sense of "utilized"] some sales he may be asked ". . . without mention of prices, if he knew of other sales of properties similarly located and whether he considered them, and if not, why not . . ." indicates trial counsel's course of action in instance (2).

Following the enunciation of the rule of the *Pennsylvania Co., etc.,* case, Kephart, J. reaffirmed the doctrine of the Pennsylvania court that ". . . grave danger . . . attends the introduction of evidence of this character, as it has a tendency to raise collateral issues as to the circumstances of each individual sale . . ." He continued, ". . . but when these sales form a part of the judgment of the witness, in fairness the opposing side should know the source of his information."

One of the cases most frequently cited for propositions of law relating to the admissibility of sales price evidence is *McSorley v. Avalon Borough School District.*[42] But all such statements in that case are dicta and adequately appear in the discussion of the other cases in this article. The single holding in the *McSorley* case was that the replacement value of a house and garage

[42] 291 Pa. 252, 139 Atl. 848 (1927).

may not be shown in chief for the purpose of corroborating valuation witnesses who have testified as to the value of the buildings apart from the value of the land.

The phraseology of the trial court's charge was again in issue in *Broomall v. Pennsylvania Railroad Co.*[43] Both sides had cross-examined the witnesses for the other side as to prices paid for similar properties for the purpose of determining the witnesses' ability to appraise. On his motion for a new trial the plaintiff complained of the following language in the instructions given to the jury:

> "In doing that [fixing the fair market value of the property before the taking] it is only fair that you should take into consideration, in so far as it has been testified to, all the prices which were paid for other lands in the community when sales were made."

The lower court agreed with the plaintiff that this terminology allowed the jury to consider the sales prices as evidence going toward value and granted a new trial. Defendant appealed from this order and was successful in having it reversed. The Supreme Court stated that the general import of the charge was that the jury should only regard the general selling price in fixing value and that the clause "in so far as it has been testified to" saved the challenged language from error. One suspects, however, that the court thought the case, which had been "tried and presented at length" need not be retried on account of this one point. Other quotations from the charge, and of course the action of the lower court itself, sustain plaintiff's argument.

Fisher v. Allegheny County[44] held that a deed was not admissible for the purpose of affecting the credibility of a valuation witness where it was not clear that the sale referred to by the witness was the same transaction represented by the deed. It also ruled that the testimony of a witness as to a particular sale may not be allowed for the purpose of contradicting one of the adversary's witnesses where it was not clear that the two were referring to the same sale. In a dictum Maxey, J. states at page 476:

> "If they had specifically mentioned such a sale and had given an erroneous figure as the sale price, the trial judge should have overruled the objection to the offer of the deed for the purposes for which it was offered."

The rule of the *Henkel* case as to a "misapprehension of the facts" is then recited.

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[43] 296 Pa. 132, 145 Alt. 703 (1929).
[44] 324 Pa. 471, 188 Atl. 196 (1936).

There were three rulings in *Pittsburgh Terminal Warehouse and Transfer Company v. Pittsburgh.*[45] First: a witness may not be asked as to the price paid in the sale of a neighboring property during preliminary cross-examination as to his competency to testify. Second: he may not be asked on regular cross-examination the selling prices of similar properties where he has not stated previously that his opinion was based on those sales. Third: the exclusion of evidence in rebuttal, ordinarily admissible, by which plaintiff offered to show that a sale mentioned by one of defendant's witnesses was for convenience between two corporations having the same stockholders, was not error of sufficient practical import in a case fully and even laboriously tried to require reversal where the witness for the defendant had not stated the price of the sale.

No sales price question is involved in *Ray v. Philadelphia*[46] but there is dicta by Drew, J. at page 442 which mirrors the up-grading of the initial low estate of a "particular sale" in Pennsylvania:

> "The world is mad with opinions upon every imaginable subject, but fortunately we only have to take those we approve. And so it is with juries; they may reject in toto the opinion of any witness they disbelieve, and this whether that opinion is contradicted or not.
>
> "To illustrate, it would be difficult to get a more opposite case than the instant one. It is impossible, or next to it, for anyone to know the dollar and cent market value of any piece of real estate. Some think they know, but when pressed or forced to admit that their valuation is only their opinion. There are so many elements, so many contingencies, so many uncontrolled factors, that enter into the market value of real estate, that nothing less than an actual sale of the same or like property under similar conditions, can really fortify a person to say he knows the precise market value of the property. And even then, changes are so sudden and all conditions seldom known, that almost invariably all the influences which promote a sale in one case are seldom present in another."

The last case for consideration is *Berkley v. Jeannette*[47] which held again that a value witness may not be cross-examined regarding the sale price of a similar property if his testimony does not reflect that it entered into his estimate as a factor upon which value was based. Emphasis was again placed on the discretion of the trial courts when Jones, J., now Chief Justice, said at page 383:

> "Furthermore, in prescribing the range of cross-examination, especially where it touches collateral matter, much must be left to the sound discretion of the trial judge. . ."

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[45] 330 Pa. 72, 198 Atl. 632 (1938).
[46] 344 Pa. 439, 25 A.2d 145 (1942).
[47] 373 Pa. 376, 96 A.2d 118 (1953).

II. Subject Property Sales

The question of the evidentiary worth of the price paid for the particular property to be valued is distinct from the question considered in Part I of this article. It is also simpler of solution. But the effect of the rule adopted in the cases of similar property sales was strong enough to make an imprint upon the decisions involving the very property in question and, as a result, the development of a clear and logical rule in the latter type case was seriously affected. It was not until the decision of *Berger v. Public Parking Authority of Pittsburgh,*[48] in 1954, that the Pennsylvania Court committed itself with any degree of definiteness to the proposition that this type of evidence is useful in fixing market value in eminent domain cases, and even there the Court divided four to three.

The holdings prior to the *Berger* case are by and large compatible with the rule there adopted. Authority and reason support it, but a considerable amount of language was contradictory. The result has been a confused standard. The rule is still some time away from the full maturity and virility which it long ago ought to have attained, but at least it has emerged into the adolescence of clarification.

Before examining the cases attention should be directed to what is universally, or nearly universally, the rule:

> "Evidence of the price at which property, the value of which is an issue, brought bona fide at a voluntary sale at some time near the time as of which value is to be determined is competent evidence of its value and is one of the best and most satisfactory standards of estimating actual value, although it is not in any case conclusive of value." [49]

Of this type of evidence Nichols states:

> "A price paid under such conditions is a circumstance which a prospective purchaser would seriously consider in determining what he himself should pay for the property; as evidence before a jury it consumes little time in introduction and raises few collateral issues, so that every argument is in favor of its admissibility." [50]

The Pennsylvania cases started off well enough. The first case of this type before the Supreme Court was *East Brandywine and Waynesburg Rail-*

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[48] 380 Pa. 19, 109, A.2d 709 (1954).

[49] 20 Am. Jur., *Evidence* § 373 (1939).

[50] 5 Nichols, Eminent Domain § 21.2 (3rd ed. 1952).

road Co. v. Ranck,[51] where it was held that the defendant ought to have been allowed:

> 1. To ask a witness for plaintiff on cross-examination whether the plaintiff had not sold a portion of his farm after the condemnation at a figure which the witness had testified on direct examination was the highest value of that portion of the farm before condemnation, and
>
> 2. To prove its offer made in chief by showing:
>
> a. the sale,
>
> b. an offer made by the plaintiff before condemnation to sell the entire farm at a stated price per acre,
>
> c. a declaration by the plaintiff before condemnation of the value of the whole farm at a price per acre,
>
> d. that plaintiff had offered the entire farm for sale at a public sale before the condemnation and the prices bid on it, and
>
> e. statements made by plaintiff shortly before the trial to the effect that his property had been specially benefitted and that he would not then take a stated sum for his remaining land.

With regard to item 1: it necessarily was directed to impeaching the credibility of the witness to whom the question was directed. The remaining items, however, were considered by the Court to be competent as bearing on the value of plaintiff's property. The language of the Court is not as explicit in this regard as it might have been. For example, the thought is expressed that the offer by the plaintiff of his property at a fixed price and the sale of part of it were proper facts to go to the jury as constituting his estimate of value. This phraseology has been interpreted by some as indicating that the offer and sale were thought by the Court to be in the nature of an admission.[52] Even assuming such is the correct interpretation (this is a problem which reoccurs in a number of the subsequent cases) the evidence would go toward value, for, as Wigmore makes clear, an admission against interest by a party to an action has the twofold evidential effect of (1) discrediting the declarant, as in the case of a prior self-contradiction, and (2) being of assertive testimonial value to prove the facts stated (or acted) in the admission.[53] But further discussion is unnecessary for even the minority opinion in the *Berger* case flatly admits that the Ranck decision did admit the evidence there offered as bearing on value.

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[51] 78 Pa. 454 (1875).

[52] See, e.g., 1 HENRY, PENNSYLVANIA EVIDENCE § 78 (4th ed. 1953).

[53] 4 WIGMORE 1048.

The next case to be noted is remotely associated with the present inquiry in a negative sense. In *Pennsylvania Schuylkill Valley R. Co. v. Cleary*[54] the Court reversed where plaintiff had been allowed to show refusals to sell or lease to explain away the defendant's evidence that the subject property was only used as a truck farm. Plaintiff contended it was ripe for subdivision into lots. The theory of the court was that the views of the owner in this respect were not relevant in establishing what the land was worth.

In *Geissinger v. Hellertown Borough*[55] the defendant, while cross-examining the property owner, proposed to show for the purpose of testing his knowledge of the value of the property, that land in the neighborhood was worth more at the time plaintiff's predecessor in title purchased the subject property than at the time of the appropriation. He also proposed to show the price of that sale. Both the lower court and the Supreme Court rejected this evidence. The time between the predecessor's purchase and the appropriation does not appear. Orgel sees no logical reason for excluding a sale by a predecessor in title, assuming the time be not too remote, though he does admit that more practical effect will be given to the purchase by the owner who appears before the jury as claimant.[56]

A more important case is *Reinhold v. Ephrata Borough.*[57] After testifying to a before value of $4,000 and an after value of $3,225, Reinhold was asked by his counsel upon what he based his judgment. He replied that he had a parol contract for the sale of the land before the condemnation for $4,000 and that he actually sold it to another after the completion of the improvement (the first buyer having backed out) for $3,225. Plaintiff's eight witnesses testified to damages in the same range. The trial court charged that if the jury believed the plaintiff, the sales were evidence to be considered in connection with all the other testimony. The defendant, aggrieved by a $500 verdict for plaintiff, appealed. He contended that testimony as to the parol sale of the lot should not have gone to the jury. The Court held that under the circumstances the evidence was not so erroneous as a matter of law as to require a reversal. In arriving at this conclusion the Court took into account the estimates of plaintiff's corroborating witnesses. As in other of these early cases the opinion is of little help. The Court says, for example, that it is important to keep in view the precise testimony and the way it was introduced; though it belongs to a class of evidence not usually admitted on behalf of a party himself, it would have been perfectly proper on cross-

[54] 125 Pa. 442, 17 Atl. 468 (1889).
[55] 133 Pa. 522, 19 Atl. 412 (1890).
[56] 1 ORGEL 136.
[57] 171 Pa. 425, 33 Atl. 362 (1895).

examination. The significance of such statements is moot. One must rely on what the court actually did. This decision allowed the jury, in arriving at the value of the property condemned, to consider evidence of a parol sale and a post-appropriation sale (apparently not challenged).

The *East Brandywine and Waynesburg R. R. Co.* case was followed in *Houston v. Western Washington Railroad Co.*,[58] where the defendant called plaintiff as-for-cross-examination and offered to show the price at which the plaintiff optioned his land a short time before the location of the railroad and the price at which he sold a large tract of it shortly after the road had been located but before its completion. The purpose of the proof was to give the jury the plaintiff's own estimate of value of the land on the dates of the options. The proof was to be followed by testimony showing that the increase price was a direct result of the location of the railroad. The defendant also offered the deed for the sale after location. Mestrezat, J., held for the Court that the evidence offered should have been allowed for the reason that the declarations or acts of a party showing his estimate of the value of his property at or about the time it is taken are evidence to his prejudice in eminent domain proceedings.

Prior to the condemnation of his property by the Pittsburgh, Carnegie & Western Railroad Company, Kaufman wrote a letter to the railroad offering to sell his property to it or a competitor, whichever met his price of $600 a front foot. His letter indicated he had previously made a similar offer and that he considered the price reasonable. There was no expression or implication in it of a compromise. At the trial of the case[59] the defendant was allowed to introduce the letter into evidence. In rebuttal plaintiff testified that the letter was written in the course of negotiations "to sell" (not "to compromise") the property to the railroad. Plaintiff appealed, assigning the admission of the letter as error Held: owners of property are bound by declarations as to value or offers to sell at a specified price at or about the time of the taking, and that, in this case, plaintiff had failed to show the declaration was made by way of compromise. The Court cited no authority but had been referred by the defendant to the *Ranck* and *Houston* cases.[60]

Davis v. Pennsylvania Railroad Co.[61] is the first eminent domain case in which the defendant was not allowed to show the purchase price paid for

[58] 204 Pa. 321, 54 Atl. 166 (1903).,

[59] Kaufman v. Pittsburg, Carnegie & Western R.R., 210 Pa. 440, 60 Atl. 2 (1904).

[60] No attempt has been made in this article to treat exhaustively of cases concerning offers, options, leases, rentals or compromise negotiations. Only those closely related to and shedding light on the principal subject have been discussed.

[61] 215 Pa. 581, 64 Atl. 774 (1906).

the property by the owner at the time of the appropriation. In this instance the farm had been bought seventeen years before the entry. The Court said that such evidence would have given the jury no proper estimate of its value "immediately before the taking." Note the Court did not say that the purchase price was inadmissible per se. This is a remoteness of time case.

A comparison with the similar property sales rule first appeared in *Rea v. Pittsburgh and Connellsville R. R. Co.*,[62] decided in 1910. The condemnation occurred in 1903 and the property had been purchased in 1900 by Henry Rea, Jr. for $140,000. At the trial, Henry B. Rea, the son and executor of the then deceased purchaser, testified as one of the claimants to a market value of $1,056,000. On cross-examination he was asked what he or his father had paid for the property. Objection sustained. Defendant then offered to show by the witness on the stand, for the purpose of testing the credibility of his testimony and the competency of his knowledge as to the value of this property at the time of the taking, that his father had purchased the property in 1900, that the seller had it upon the market for a number of years and was able to hold it until the fair market value was realized, the price at which it was sold and that there was no increase in the market value as was indicated by the witness's testimony between the time of the sale and the appropriation. An objection to this offer was also sustained. During its case in chief the defendant called the same witness and made substantially the same offer, this time for the purpose of giving to the jury information tending to show the market value of the property when condemned. Plaintiff's objection to this offer was again sustained.

On appeal, the Supreme Court held that "the offers as a whole were properly refused. They contain too many points collateral to the main one sought to be proved, and the proffered evidence was not part of the defendant's case in chief."

But it was also held that the question asked of Rea about the purchase price was, under the peculiar facts of the case, proper cross-examination and should have been admitted.

No more is said regarding the offers than appears above. The rejection of the first resulted as much from the matter it contained being properly provable in defendant's (and not plaintiff's) case as for any other reason. The refusal to allow the second appears to be a holding against the admissibility of the purchase price as going toward value, for this offer was made

[62] 229 Pa. 106, 78 Atl. 73 (1910).

for that express purpose during the defendant's case. But this is not at all certain. The Court, in the course of its opinion by Moschzisker, J., said:

> "In many jurisdictions evidence of this character is considered directly pertinent on the question of value . . . [citing numerous cases] . . . But it is not necessary to go so far in the present case, for the defendant here sought to have the testimony admitted as proper cross-examination."

The safer course is to consider that the Court refrained from deciding the issue. Though it is not entitled to any weight in resolving this aspect of the case, it is interesting to note that the Court nowhere mentioned the different purpose of the second offer.

On the issue of cross-examining as to purchase price the Court limited its admissibility to its impeachment effect, saying:

> ". . . and so under the circumstances of this case, while the testimony sought to be elicited by the question propounded to the claimant concerning the price paid for the land would not fix the value of the property, it would be some evidence to be considered in weighing his opinion as to its value. . . ."

In arriving at its decision on the propriety of the question asked on cross-examination the Court in turn: (1) quoted *Davis v. Pennsylvania Railroad Co.* to the effect that the greatest latitude should be allowed on cross-examination to permit every pertinent question which will enable the jury to place a fair estimate of the weight to be given the testimony as to damages; (2) reviewed the Pennsylvania cases relating to the admissibility of the prices at which properties in the neighborhood had sold and concluded that since a claimant who has expressed an opinion on the value of his own property may be asked concerning sales of other properties in the neighborhood to test his good faith, that he ought to be able to be asked concerning the sale of his own property, provided the sale in question is not too remote from the date of appropriation; (3) argued that surely in a case like the present where, according to the plaintiff, there is a 650% increase in two years and eight months, such an inquiry is relevant to test his "good faith," subject, of course, to his right to prove any relevant explanatory facts; (4) found nothing in the law that prohibited the question; (5) said of the *Ranck* case that the fact that the plaintiff there had offered to sell his farm at a certain price did not fix its value, but under the circumstances of that case was viewed as some evidence to go to the jury; and (6) set forth the following standard:

> "Where such testimony is offered the question of its acceptance or rejection will necessarily depend upon the circumstances in each particular case, the disparity between the price paid and the value claimed, the length of time between the sale and the appropriation, and other elements which may

present themselves tending to show the worth of the testimony as evidence affecting the importance, and throwing light upon the accuracy and good faith, of the opinion expressed by the witness. Therefore, the question will always be one for the exercise of discretion on the part of the trial judge. But in the present case the record indicates that the trial judge did not reject the testimony in the exercise of such discretion, but rather because he considered it not proper cross-examination. We are of opinion that it was proper cross-examination and should have been admitted."

The case of *Miller v. Western Allegheny Railroad Company* [63] is not a sales price case. However, the Superior Court used the language of those decisions in arriving at its own decision. Plaintiff's land contained coal deposits. In an appeal from a viewers' award he was asked and required to state on cross-examination the price at which he succeeded in selling his coal. It was held that the question was improper for the reason that particular sales are not "evidence of the general market value with which alone juries are to deal in cases like the one before us." Obviously, this was a case involving a sale of a products of the property and not of the property itself.

Soisson v. Connellsville School District [64] is of little if any value. In a short, per curiam opinion the judgment of the lower court was affirmed, the assignments of error not calling for discussion, in a case where the defendant was not permitted to show the price plaintiffs had paid for the land in question more than four years before the condemnation.

The shoe was on the other foot in *Leaf v. Pennsylvania Co.*[65] There it was the plaintiff who attempted to cross-examine one of the defendant's witnesses as to the price paid some time previously for a part of the same piece of land by the same company. The attempt was made when the witness was being examined preliminarily to test his competency. It was held that such evidence was not admissible during the preliminary examination. The Court went on to say that if the question had been asked after competency was established and an estimate of value given there was nothing on the record to justify the cross-examination and that the sale price in no way aided, nor was it a factor in this witness's estimate of value. The court made a reference to the then very recent case of *Pennsylvania Company, etc., v. Philadelphia,*[66] a comparable property sales case which held that a valuation witness may be cross-examined as to the price of a sale only after he says that he considered the sale in arriving at his opinion.

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[63] 47 Pa. Super. 613 (1911).
[64] 262 Pa. 80, 104 Atl. 892 (1918).
[65] 268 Pa. 579, 112 Atl. 243 (1920).
[66] 268 Pa. 559, 112 Atl. 76 (1920).

The precise holding of the important case of *Greenfield v. Philadelphia*[67] is that a property owner who testifies in his own case, even though he does not testify to value, may be cross-examined as to the price he paid for his property if the purchase is not too remote from the appropriation. The reason given for this rule is that a party to an action who offers himself as a witness does so as to all relevant matters so long as they are not properly matters of defense or would not unduly confuse the jury if brought out at that point. The information elicited here was not strictly a matter of defense but was as to a fact essential to plaintiff's case.

In the opinion of Schaffer, J., certain language is used which illustrates a changing opinion on the part of the Court with regard to the value of price evidence when the price involved is that of the particular property in question. For example, the Court says:

> "Plaintiff in the case in hand could not conceal a most material fact, possibly known only to him, what he had so recently paid for the property, and leave the jury in the dark as to this most important circumstance."

Later, a statement from the *Rea* case is picked out and thus given emphasis:

> "In commenting upon the reason for the exclusion of testimony as to the price paid for other properties, the present Chief Justice, speaking for the court, pointed out (p. 116): 'The objection to the admission of testimony of particular sales is placed upon the theory that it would lead to the investigation of "collateral issues as numerous as the sales." . . . It is plain that this does not apply to the admission of testimony concerning a single sale of the very property in controversy.' "

And here is language which says purchase price goes to show value:

> ". . . it is not the fact that he has expressed such opinion [on value] which makes the cross-examination proper . . . but that, the value of the property at the time of the purchase being one of the main factors in question, it is proper to probe him on the subject of the price he paid, because that price, not too remote from the time of taking, necessarily must be a prime subject for consideration in fixing the value of the property before the appropriation."

It should be noted that these quotations formed a part of the decisions of the court only in so far as they support the proposition that proof of value is an integral part of plaintiff's case and not of defendant's.

Notice will be taken in Part III of this article that the opposite rule prevails in Pennsylvania tax assessment cases. This is an anomaly beyond

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[67] 282 Pa. 344, 127 Atl. 768 (1925).

belief since the exact issues are involved. In the *Greenfield* case the following mention is made of the tax assessment rule:

> "We have very recently held in tax assessment cases, where the inquiry is almost precisely the same as in cases such as the one we are considering,—the fair market value of the property at a given time,—that the sale price of the particular piece of real estate is to be taken into account by the taxing authorities in fixing the assessment: Kaemmerling's App., 282 Pa. 78."

Westinghouse Air Brake Company v. Pittsburgh[68] involved the admissibility of an option price given for the property of the plaintiff-corporation. The president of Westinghouse had been improperly cross-examined when he was asked whether the company did not carry the property on its books at $1,114,067.50, with the suggestion that the reason was to avoid taxes. The president had testified to a before value of $1,400,000.00. On re-direct examination the president was asked upon what he based his opinion and he then referred to the option price as the basis. It was held that the question on re-direct examination was proper after the improper assault on the witness's testimony in chief. Mr. Justice Kephart said for the court that the option was not submitted as evidence in chief but only in re-direct examination.

It was held not to be error to deny the defendant the right to cross-examine the plaintiff as to the amount he paid for his property, somewhat less than a year before the taking, where the evidence indicated that the property was not purchased for cash but was traded in for other real estate. This decision was *Goodman v. City of Bethlehem.*[69] The Court said that since the property was exchanged the situation would have necessitated an investigation into the value of the other property which would undoubtedly have been confusing to the jury.

The next case involving a purchase price was *Lutz v. Allegheny County.*[70] The plaintiff appealed from a judgment in his favor and complained that he had been indirectly cross-examined as to the cost of his property. The Supreme Court held that there was no error committed because one of the plaintiff's own witnesses had testified without objection to the exact sum paid. The Court added that the plaintiff could, moreover, have been asked on cross-examination, the direct question as to what he had paid for his property. *Greenfield v. Philadelphia* was cited on this point. It should be noted that the plaintiff had purchased the property for $9,660 and testified that it was worth $136,314 at the time of the appropriation seven years later.

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[68] 316 Pa. 372, 176 Atl. 13 (1934).
[69] 323 Pa. 58, 185 Atl. 719 (1936).
[70] 327 Pa. 587, 195 Atl. 1 (1937).

In *Berkley v. Jeannette*[71] the property owner had acquired his house and lot ten months prior to the condemnation and the adjoining vacant lot four months before the taking. At a trial to fix the damages due plaintiff the trial court refused to allow the plaintiff to be cross-examined regarding the prices he paid for his property. On appeal by the defendant the ruling of the lower court was sustained on the theory that the two properties when merged into one undoubtedly took on an increased value. To allow cross-examination would be to confuse the jury and it would not have served its purpose of impeachment since the two sums when added together would not have given a figure related to the value of the two lots as a whole.

The opinion of the Court was written by Jones, J., now Chief Justice. After reviewing the *Rea* and *Greenfield* cases the following was deduced by Mr. Justice Jones:

> "The rule to be deduced from the Rea and Greenfield cases is that, when an owner of property offers himself as a witness upon the trial of his claim for damages due to a condemnation of his property or a portion of it, he may be asked on cross-examination what he paid for the property, if his acquisition thereof is not so remote as to deprive the purchase price of any relevant evidentiary worth; and, that is so, whether or not he testified to the value of his property upon direct examination. Introduction of the purchase price is not permitted, however, in order to influence, by comparison, the jury's determination of the property's value at the time of condemnation. Its legally intended office is to affect the credibilty of the witness in respect of his valuation opinion (as in the Rea case) or to impeach the integrity of his claim (as in the Greenfield case)."

These words of Jones, J. presage his dissent in the *Berger* case.

Another expression of the same jurist which was to become an important part of his *Berger* dissent is found in *Avins v. Commonwealth.*[72] The Court there reversed the decision of the lower court and awarded a new trial. In doing so Jones, J. noted defendant's contention ". . . that the trial court erred in refusing to admit in evidence, for the purpose of impeaching the integrity of the plaintiff's claim, the deed of conveyance by which title to the property involved passed to the plaintiffs or their privies four years prior to the condemnation for a consideration of $6,000." The opinion writer declared that this question would have to await the circumstances of the new trial but that attention should be given to *Berkley v. Jeannette* where the circumstances of admissibility were spelled out, and that,

> ". . . any question of remoteness, which can depend upon changed conditions as well as elapsed time, will be a matter for the trial court to pass upon in the exercise of its sound direction."

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[71] 373 Pa. 376, 96 A.2d 118 (1953).
[72] 379 Pa. 202, 108 A.2d 788 (1954).

As noted at the beginning of this part, the present authoritative case on this subject is *Berger v. Public Parking Authority of Pittsburgh.*[73] The Berger property, situated in downtown Pittsburgh, was appropriated for public use on February 28, 1951. Berger had purchased it on June 27, 1946 and a year later, on July 19, 1947, had entered into a written agreement to sell it to one Speer for $36,000. The sale fell through in November of that year apparently because of Speer's inability to finance the purchase. At the trial of the condemnation case the defendant attempted to cross-examine Berger and to examine Speer concerning the written agreement of sale dated July 19, 1947. It also offered into evidence the agreement. The trial court refused to allow the defendant to cross-examine Berger or examine Speer as to the sale, and excluded the agreement of sale.

After its motion for a new trial was denied the Authority appealed to the Pennsylvania Supreme Court. There the judgment was reversed and a new trial granted. Mr. Justice Bell wrote the opinion for the majority. Chidsey, J. concurred in the result. Mr. Justice Jones wrote a strong and even fervent dissenting opinion in which Stearne, J. joined. Musmanno, J. dissented without comment.

Before discussing the reasons given by the majority and minority it is necessary to observe that this was not an attempt to prove purchase price. The endeavor was to show the agreement of sale made by the owner. The two opinions of the *Berger* case, however, do not make a distinction between purchase price and agreement of sale situations and couple the two in the language used. The holding of course extends to the latter type of transaction only.

The majority held that the defendant should have been allowed to cross-examine Berger and to introduce the agreement of sale. They considered the 1947 agreement of sale proper evidence for the jury on the question of market value as well as being useful to discredit the claimant and his witnesses. Reliance for the ruling was placed on the *Ranck, Lutz, Rea,* and *Greenfield* cases. The position was taken that an owner may generally be asked what he paid for the property and the price at which he offered to sell it, *if* the purchase or sale was not too remote *and* his offer of it at a fixed price (here consummated by an acceptance) was a fact proper to go to the jury as constituting his estimate of its value. The Court quoted from the *Rea* case to the effect that the objection to the admission of testimony of particular sales is placed upon the theory that it would lead to the investigation of collateral issues as numerous as the sales, and then laid particular stress on the state-

[73] 380 Pa. 19, 109 A.2d 709 (1954).

ment of the *Rea* case court that, "It is plain that this does not apply to the admission of testimony concerning a single sale of the very property in controversy." Though not expressly stated it appears certain that the agreement of sale was in itself thought to be evidence tending to show value. The dissent considers this to have been the decision.

The appellee's contention, that the change in the character of the neighborhood and the great increase in the value of properties situated there were sufficient grounds for entirely excluding evidence of the purchase or sale price, was said by the Court to be completely refuted and disposed of by the *Greenfield* case where the same point had been made. While the owner has the right to explain or deny or rebut evidence of purchase or sale price, and to offer evidence of a change in the neighborhood or any increase there in property values or any other relevant fact, this goes only to the weight of the evidence and not to its admissibility.

Essentially two reasons formed the basis of the dissent. The first of these reasons was that the minority conceived the general rule to be that no evidence at all was allowed as to the purchase price paid for any particular property or the sum at which it was offered or sold for the purpose of showing value. It was considered that such evidence was admissible only in the exceptional instance where there was a wide disparity between the price paid or the sum offered and the value claimed for the property as of the date of appropriation, and then only on cross-examination for the purpose of affecting credibility. This idea can be traced back to the *Rea* case and was reiterated in the case of *Pennsylvania Company for Insurance on Lives, etc. v. Philadelphia*[74] where Kephart, J. speaking for the court said:

> "The rejection of such evidence is largely within the discretion of the trial court . . . which this court will not disturb unless it is manifest the evidence should have been admitted. . . . The occasion does not arise where the difference between the sale price and the estimate of value is such as not to be a subject of comment or such that it may be explained, or where properties, though in the same neighborhood, are not similarly situated."

The foundation for this interpretation is based on the difficulties inherent in allowing collateral matter to be shown. Near the end of his opinion Jones, J. denounces what he considers will be the effects of the majority opinion: "Proofs of countervailing collateral matter will follow the introduction of collateral matter; confusion of the issue on trial will be worse confounded; and litigation over damages for land taken by condemnation will become truly interminable."

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[74] 268 Pa. 559, 112 Atl. 76 (1920).

It is appropriate at this point to submit that in the majority of states where specific sales prices and particularly purchase prices are allowed as affirmative evidence, there is no complaint that trials are unduly prolonged; and further that it might well be that many claims presently litigated would be amicably settled between the condemnor and the property owner if there was a realization that the real estate experts would be faced by properly empowered cross-examiners. The end of cross-examination is to test the truth. If a sale is not a proper criterion of value a truthful and competent witness will be able easily and forcefully to demonstrate that fact.

The second basis of the *Berger* dissent was that the term "remoteness" is not limited merely to time, but that it also includes situations where a change of circumstances has lessened the relevancy of the matter sought to be proved. Mr. Justice Jones accuses the majority of ignoring this latter element in its review of the trial court's exercise of discretion. While remoteness is undoubtedly as inclusive as he states, nonetheless it is arguable that the weight of the evidence should be left in the hands of the jury in these instances unless the change in circumstances was so marked or abrupt, or the time differential was so great that the jury would be better off without having the information.

The Berger decision is the first step in the direction of formulating a Pennsylvania rule that will be more precise and more in accord with the rules of other jurisdictions than was the case before it was submitted.[75]

In the case of *Young v. Upper Yoder Township School District*[76] the price paid by the property owner nine and one-half years before condemnation was not admitted by the lower court where there had been substantial changes in the character of the neighborhood and where, though the court does not take particular note of it, the plaintiff had improved other land that he owned in the same neighborhood by erecting and selling dwelling houses. This exclusion was affirmed in a per curiam opinion by the Supreme Court quoting parts of the decision of the lower court. Only one of these needs to be quoted here:

> ". . . it is clear especially since Berger v. Public Parking Authority of Pittsburgh, 380 Pa. 19, that generally, whether for the purpose of testing

[75] We have seen in Part I that the court in U.S. v. Certain Parcels of Land in Philadelphia, 144 F.2d 626 (3rd Cir. 1944), predicted the Pennsylvania courts would not admit a written contract for the sale of the identical property involved executed before the taking. In the Berger case such a contract was admitted. This misprediction in no way detracts from the fine analysis of the Pennsylvania rule by the federal court. It very nearly was not allowed. Of passing interest is the fact that one of the two Circuit Judges who comprised, with District Judge Bard, the federal court was Mr. Justice, now Chief Justice Jones, who dissented in the Berger case. He also dissented in the Philadelphia case but there on the sole ground that the "writing" was not an enforcible agreement and therefore not admissible regardless which law applied or what it provided.

[76] 383 Pa. 320, 118 A.2d 440 (1955).

> his credibility or to establish value or both, an owner may be asked on cross-examination what he paid for the property and the price at which he offered to sell it if purchase or sale was not too remote. . . . This is the rule elsewhere."

Peterson v. Pittsburgh Public Parking Authority[77] and *Simpson v. Pennsylvania Turnpike Commission*[78] each involved the question of post-appropriation sales. In both cases the appellate court agreed with the trial courts that the evidence was not admissible.[79] In addition, in the *Simpson* case there had been an offer to prove an offering price allegedly made by the husband-owner but promptly repudiated by the wife-owner. The court held that such evidence was properly excluded.

The question before the Court in *Braughler v. Commonwealth*[80] was not one of evidence but whether the lower court had abused its discretion in awarding a new trial after the refusal of the plaintiff to remit all of the $6,000.00 verdict over $4,500.00. The condemnation had taken only a small portion of a large farm purchased by the plaintiff only three months before the appropriation for the sum of $6,000.00. None of the farm buildings had been affected by the taking. The Court affirmed finding that the lower court was justified in disbelieving the testimony of the property owner and his witnesses. Mr. Justice Musmanno dissented on the grounds that a new trial would result in an identical verdict and that the majority had ignored the possibility that Braughler had gotten a bargain.[81]

In *Ward v. Commonwealth*[82] the Court had before it the question of the admissibility of the purchase price in what was a "forced sale" situation. The purchase of the property by the owner at the time of condemnation had occurred five years before the appropriation. The defendant attempted to ask the plaintiff on cross-examination how much he had paid for the property. On objection the trial court conducted a preliminary inquiry out of the hearing of the jury and heard testimony from the plaintiff that the property was purchased from a bank, then liquidating the assets of a corporation. At this preliminary inquiry the plaintiff also testified that the value of comparable

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[77] 383 Pa. 383, 119 A.2d 79 (1956).

[78] 384 Pa. 335, 121 A.2d 84 (1956).

[79] This is a question ripe for further study. If pre-condemnation subject (and similar) property sales are relevant to prove before value why are not post-condemnation sales relevant to prove after-value in partial taking cases? Most appropriations are fixed as of an arbitrary time, e.g., the filing of a bond, or the approval of a plan. It often takes one or more years to complete the public improvement and actually see how the property has been affected so that the time differential is seldom as bad as it seems. Earlier Pennsylvania cases have allowed consideration of post-appropriation sales: East Brandywine & Waynesburg R.R. v. Ranck, 78 Pa. 454 (1875) for example.

[80] 388 Pa. 573, 131 A.2d 341 (1957).

[81] The verdict in the second trial was $3,000. No. 226 June v.c.t., 1954, Court of Com. Pleas, Indiana County.

[82] 390 Pa. 526, 136 A.2d 309 (1957).

property in the neighborhood had increased two to ten times from the date of acquisition to the date of appropriation. There was no rebuttal of these facts by the defendant. On the basis of these facts the trial court decided that the sale was not a "voluntary one" and refused to allow the question. This seems to be the first case of this kind before the appellate courts of Pennsylvania. Their decision is in accordance with the majority of other jurisdictions. Nichols refers to this type of case as follows:

> "Even in the states in which evidence of sales of neighboring land is admitted, it is almost universally held that a sale is not competent unless it was voluntary on both sides; unless, in other words, it was the result of the uncontrolled bargaining of a vendor willing but not obliged to sell with a purchaser willing but not obliged to buy. Forced sales, such as a sale of real estate by an administrator, a sale under a deed of trust or execution, a sheriff's sale, or a sale upon the foreclosure of a mortgage, are not admissible, because they do not show market value." [83]

The most recent case involving the selling price of the property in question to come before the Court was *Brown & Vaughn Development Co. v. Commonwealth.*[84] There the claim was made by the defendant on appeal that the trial court had disparaged the evidence of the price paid by the plaintiff six months prior to the condemnation to the prejudice of the Commonwealth. There was no question as to the admissibility of such evidence. The Supreme Court found that there was in fact no such disparagement and that, in any event, it could not have prejudiced the defendant. It should be noted that the deed showing the consideration was itself introduced as an exhibit. In this case, the defendant's witnesses themselves valued the property at considerably more than the purchase price because of the amount of development of the property effected by the owner.

III. Tax Assessments and Miscellaneous Cases

Tax Assessment Cases

A very brief reference to some non-eminent domain cases will suffice to show that the rule in condemnation cases excluding the prices at which similar properties have sold on direct examination and the rule as to the admissibility of purchase prices and offers to sell of the subject property, clouded until the *Berger* case in 1954, have not always been applied by the Pennsylvania courts.

In tax assessment cases the issue is precisely the same as in land damage cases, to wit: the value of a particular property as of a given time. In this

[83] 5 NICHOLS, EMINENT DOMAIN § 21.32 (3rd ed. 1952).
[84] 393 Pa. 589, —— A.2d ——,

type of case the Pennsylvania courts have always considered purchase price to be of great importance and, until a 1946 decision, it would appear that the selling prices of similar properties were also given great weight.

In *Appeal of Pennsylvania Company for Insurance on Lives and Granting Annuities*[85] the Supreme Court reversed the decree of the lower court on the ground that proof of offers by the owner to sell the land in question was rejected by the court below. In addition to this holding the Court said by way of a dictum, "The holding price of other lands similarly situated may be the basis of an estimate of worth." The Court also defined fair market value at page 74 as follows:

> "By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied."

Note that this is the presently prevailing definition of fair market value.

Kaemmerling's Appeal[86] which was referred to in *Greenfield v. Philadelphia*[87] held that the purchase price of the property being valued was admissible as bearing on market value.

This rule was followed in *Sailer's Appeal*[88] where the lower court was reversed for not considering, in arriving at market value, the price paid for the subject property. The importance of a sale of the particular property was emphasized as follows at page 71:

> ". . . but he [the witness] knew of no other sales in the neighborhood, and, therefore, his valuation was not determined by a sale—the best criterion of market value, but simply on his opinion, which cannot prevail in the face of existing facts."

And again at page 72:

> "The learned court below did not give us the benefit of an opinion. Apparently he refused to accept the best test recognized of market value, to wit: a sale, and fixed a market value which we think was not warranted by the evidence. As in Kaemmerling's Appeal, supra (282 Pa. 78, 83), he 'refused to consider as evidence the price paid for the property by the purchaser. . .'"

The tax assessment cases have necessarily a statutory origin in that the assessor is directed by legislative enactment to assess, rate and value all objects

[85] 282 Pa. 69, 127 Atl. 441 (1925).
[86] 282 Pa. 78, 127 Atl. 439 (1925).
[87] 282 Pa. 344, 127 Atl. 768 (1925).
[88] 120 Pa. Super. 69, 181 Atl. 854 (1935).

of taxation within his jurisdiction. These Acts customarily contain language similar to the following: ". . . according to the actual value thereof, and at such rates and prices, for which the same would separately bona fide sell." This standard, expressed in the Act of May 15, 1841, P. L. 393, Sec. 4,[89] was involved in *Sailer's Appeal.* That these statutes, of which the Act of 1841 is typical, did not require the application of a different standard of value than market value appears from a statement by Baldrige, J., on page 70, in the opinion:

> "The courts have frequently held that under this statute the assessor is required to assess property on the basis of 'market value,' and have clearly defined that term."

The definition of the term "market value" is then given according to the willing seller-willing buyer test. This is the only distinction between the tax cases and the eminent domain cases, i. e., the definition of "market value." The willing seller-willing buyer test is undoubtedly the definition that would be used in an eminent domain case today.[90]

The use of the selling prices of similar properties has also been approved, at least impliedly, by the Pennsylvania courts in fixing market value in tax assessment cases.

In *Philadelphia and Reading Coal and Iron Company v. Commissioners of Northumberland County*[91] Barnes, J. said at page 189:

> "The factors to be considered in determining the market value of coal lands have frequently been stated by this court. Besides the prices paid in sales of similar lands due regard must be given to the physical features of the property to be valued."

In *Hudson Coal Company's Appeal,*[92] Drew, J. criticized the sales presented by the parties saying:

> "The testimony offered in this case to show prices at which other lands sold fell far short of establishing the market value of appellant's property as of 1934. The few sales shown occurred long prior to this assessment.

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[89] PA. STAT. ANN. tit. 72, § 5101, since repealed. An identical provision is contained in the County Assessment Law, the repealing act: PA. STAT. ANN. tit. 72, § 5020-402 (1939).

[90] In Ward v. Commonwealth, 390 Pa. 526, 136 A. 2d 309 (1957), Musmanno, J. defined market value as "the price at which a property is sold when the owner is under no compulsion to sell and the purchaser is not for any reason forced to buy." Examples of other cases in which the purchase price of the property involved was held to be an element of some weight in fixing market value (though not controlling) are: Hickey's Appeal, 326 Pa. 467, 192 Atl. 923 (1937); Suermann v. Hadley, 327 Pa. 190, 193 Atl. 645 (1937); Barry Tax Assessment Case, 353 Pa. 74, 44 A.2d 296 (1945); Liebman v. Board of Revision of Taxes, 355 Pa. 42, 48 A.2d 866 (1946); Tenth Street Building Corporation Tax Assessment Case, 355 Pa. 226, 42 A.2d 337 (1946); Matson's Appeal, 152 Pa. Super. 424, 33 A.2d 464 (1943); York & Foster, Inc. Tax Assessment Case, 157 Pa. Super. 262, 43 A.2d 557 (1945).

[91] 322 Pa. 185, 186 Atl. 105 (1936).

[92] 327 Pa. 247, 193 Atl. 8 (1937).

> Two took place in 1919, when the coal industry was much more prosperous. A more recent sale of a coal property in Luzerne County was of no help. It did not furnish a sound basis for comparison because of differences in mining conditions."

The Court not only compared the sales but used the very word "comparison." In an eminent domain case this would be prohibited.

Another significant statement appears in *Lehigh Navigation Coal Company's Appeal* [93] wherein Barnes, J. says at page 333:

> "The legislature has prescribed market value as the standard for assessment, and, of course, the prices paid in sales of similar properties constitute the most easily applied standard for the determination of market value." [94]

The quiet and peaceful existence of the tax assessment rule was rudely shaken in 1946 in the decision of *Felin v. Philadelphia*[95] where the Court applied the eminent domain rule prohibiting evidence of the selling prices of similar properties on direct examination and allowing it only as to credibility in cross-examination in a tax assessment case. The only authorities cited were eminent domain cases. This "confusion of cases" was repeated in 1949 in *John Wanamaker, Philadelphia, Appeal.*[96]

That the legislature has no fear of having sales prices considered in tax matters appears from the first two sentences of Sec. 8 of the Act of 1947 creating the State Tax Equalization Board:

> "Immediately after its organization, the board shall accumulate and compile data showing the prices at which real property in each school district has been sold and all other available, relevant matter in any way having a bearing on the market value of real property in the several school districts. After such data has been compiled, the board shall add thereto, from time to time, such additional data concerning new sales and improvements and other data to the end that the records of the board shall at all times show the then present market value of real property in each school district as nearly as the same can be determined." [97]

Miscellaneous Cases

A number of trespass cases have considered the question of admitting evidence of the prices at which the properties have been sold.[98] Of the cases

[93] 327 Pa. 327, 193 Atl. 50 (1937).

[94] See also as examples of cases on this point: Hart's Appeal, 131 Pa. Super. 104, 199 A.2d 225 (1938) and Allentown's Appeals, 147 Pa. Super. 385, 24 A.2d 109 (1942).

[95] 354 Pa. 317, 47 A.2d 227 (1946).

[96] 360 Pa. 638, 63 A.2d 349 (1949).

[97] PA. STAT. ANN. tit. 72 § 4656.8 (1947).

[98] Vanderslice v. Philadelphia, 103 Pa. 102 (1883); Lentz v. Carnegie Bros. & Co., 145 Pa. 612, 23 Atl. 219 (1891); Matteson v. N.Y. Central & H. R. R.R., 40 Pa. Super. 234 (1909); Llewellyn v. Sunnyside Coal Co., 255 Pa. 291, 99 Atl. 869 (1917); Wissinger v. Valley Smokeless Coal Co., 271 Pa. 566, 115 Atl. 880 (1922); Procz v. American Steel & Wire Co. of N.J., 318 Pa. 395, 178 Atl. 689 (1935).

listed in the footnote, the *Vanderslice, Lentz, Llewellyn,* and *Wissinger* cases have been cited numerous times in the eminent domain decisions. These cases uniformly follow the eminent domain rules except that in the *Procz* case the Court seemed to take purchase price into consideration in determining whether or not the verdict was excessive.

In a statutory proceeding to fix the fair market value of premises sold on the foreclosure of the mortgage[99] the Court said that the amount of an offer to purchase, while it was unquestionably of evidentiary value, was not conclusive of the fair value of the premises.

In a criminal prosecution where the value of certain land became an issue it was held that the similar property sale, the price of which was sought to be shown, was too remote.[100] But the language of the Court seemed to indicate that had it not been too remote it would have been allowed to go toward showing value. In another criminal case[101] involving the value of land the Commonwealth was permitted to show the prices at which certain lands of the defendant had been sold by his assignees for the benefit of creditors for the purpose of fixing the value of the said property, and further allowed the defendant to prove the selling price of one of the same properties on a resale in rebuttal. The Court further held that the selling price of similar properties were properly rejected.

CONCLUSION

We have seen the following with regard to similar property sales: Contrary to the general rule prevailing elsewhere, Pennsylvania does not allow evidence of similar property sales prices as going toward market value. It may not be introduced on direct examination. This rule developed because of an early aversion on the part of the Pennsylvania courts to introducing collateral issues in this type of case and because of the peculiar substantive definition of market value which declared market value to be the judgment of the community or the general selling price, provable in much the same fashion as reputation evidence. The latter reason probably no longer obtains since the willing seller—willing buyer definition of market value now seems secure in our judicial system. But a valuation witness may be asked on cross-examination for the purpose of testing his credibility only as to the prices

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[99] 349 Pa. 339, 37 A.2d 733 (1944).

[100] 4 Pa. Super. 1 (1897).

[101] 14 Pa. Super. 352 (1900).

of sales of which the witness had knowledge and upon which he based his opinion of the value of the property involved in the instant case. However, the term "based" is not a word of art and if the witness used the sale, or took it into account, or considered it in forming his opinion he may be asked the price that was paid. If the witness did not consider the sale in forming his estimate of value he may be asked why he did not. It would seem that the witness may also be required to compare, to a certain extent at any rate, the property which is the subject of the inquiry and the property on which he based his opinion. The extent of this line of inquiry will fall within the discretion of the trial judge. In rebuttal or in its own case a party may show that sales and the prices thereof considered by the adversary's witnesses were based on a misapprehension of facts. Where prices are shown for several properties in one lump sum, as in a deed, for instance, the other party is entitled to show how the prices were apportioned to the several properties included. And where one's witnesses are cross-examined as to prices, it is proper in order to give the jury the full benefit of the basis of their opinion to introduce the prices of other sales on redirect examination. The extent of this inquiry will also fall within the discretion of the trial judge.

With regard to subject property sales, the following has been developed: An owner may be cross-examined as to the purchase price he paid for his property or as to offers or declarations of value or options or an agreement of sale made by him for the purpose of impeaching the credibility of his testimony or the integrity of his claim so long as the purchase, offer, declaration, option or agreement is not too remote. And at least with regard to purchase price, he need not have been a valuation witness to be subject to this cross-examination. An agreement of sale entered into by a property owner at a time and under circumstances not too remote from the date of valuation is evidence going toward the determination of market value. The term remoteness refers not only to time but to changes in conditions or fluctuations in the market. However, an owner may not be cross-examined as to the price he paid for his property even for its affect on his credibilty where a property was exchanged for other property, or where two adjoining lots are merged into one, or where the purchase was the result of a forced sale.

With regard to tax assessment cases we have seen the purchase price has long been considered as having an important bearing on market value and that the prices paid for similar properties in the neighborhood seem to have been given the same effect by the Pennsylvania courts, but that the eminent domain rule prohibiting proof of similar property sales prices as tending to show value has begun to find its way into this area of the law.

It is appropriate in concluding to consider an excerpt from the opinion by the late Chief Judge John Parker of the Fourth Circuit in the case of the *U. S. v. 25. 406 acres of land, etc., in Arlington County, Virginia:*[102]

> "In cases of this sort, we must never forget that the common sense of the twelve men on the jury is a surer guaranty of justice than any attempt that might be made to give logical application to antiquated rules of evidence. If an honest and intelligent jury is given all the facts and is correctly instructed as to the law, it will come pretty near deciding a case correctly. Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result."

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[102] 172 F.2d 990 (4th Cir. 1949).